

Internal Revenue Service

memorandum

CC:TL-N-410-88

Brl:MLTorri

date: NOV 24 1987

to: District Counsel, San Francisco CC:SF

from: Acting Director, Tax Litigation Division CC:TL

subject: [REDACTED]

This memorandum is in response to your memorandum dated September 30, 1987, requesting technical advice concerning the filing of motions on behalf of the Commissioner under I.R.C. §7430.

ISSUE

Whether there is any basis under section 7430 or any other statute or rule to file a motion for litigation costs on behalf of the Commissioner in response to a petitioner's frivolous motion for litigation costs. RIRA 7430.00-00.

CONCLUSION

We agree with you that there is no basis, statutory or otherwise, which allows the Tax Court to assess damages, litigation costs or attorney's fees against a petitioner and in favor of the Commissioner where the petitioner has filed a frivolous motion for litigation costs under section 7430.

DISCUSSION

The United States is entitled to damages up to \$5,000.00 under section 6673 where the taxpayer's action is frivolous. That section grants the Tax Court jurisdiction to award the United States damages where:

[the] proceedings before it have been instituted or maintained by the taxpayer primarily for delay, ... the taxpayer's position in such proceeding is frivolous or groundless, or ... the taxpayer unreasonably failed to pursue available administrative remedies....

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Under Rule 38 of the Federal Rules of Appellate Procedure, a Court of Appeals has discretion to award the United States double costs and attorney's fees where the taxpayer has pursued a frivolous appeal. See, e.g., Lefebvre v. Commissioner, 830 F.2d 417 (1st Cir. 1987); Koziowski v. Commissioner, 815 F.2d 78 (6th Cir. 1987); Mathes v. Commissioner, 788 F.2d 33 (D.C. Cir. 1986); Paulson v. United States, 758 F.2d 61 (2d Cir. 1985).

There is no provision, however, for an award of damages, litigation costs or attorney's fees in favor of the United States under these provisions or under section 7430. Section 7430 allows the Tax Court to award litigation costs, including attorney's fees, to the prevailing party in a proceeding commenced before that court, but "prevailing party" is defined in that section as "any party ... other than the United States or any creditor of the taxpayer involved." (Emphasis added).

The Service faces the prospect of defending a potential onslaught of frivolous motions under section 7430 such as the one filed by petitioners in the present case. We agree with you that it is unfortunate that the Commissioner cannot move for attorney's fees against taxpayers in an effort to deter such motions.

PATRICK J. DOWLING
Acting Director

By:



GERALD M. HORAN
Acting Chief, Branch No. 1
Tax Litigation Division